FILE COPY

JAN 11-1958
JAMES R. BROWNING, CLERK

No. 835

In the Supreme Court of the United States

OCTOBER TERM, 1958

HALTOM CITY STATE BANK OF FORT WORTH,
PETITIONER

v.

SEABOARD SURETY COMPANY AND THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General
GEORGE COCHRAN DOUB,
Assistant Attorney General
ALAN S. ROSENTHAL,
SHERMAN L. COHN,
Attorneys
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Statutes:

Assignment of Claims Act of 1940, 54 Stat. 1029, as amended, 31 U.S.C. 203	3
Contract Settlement Act of 1944, Sec. 14(b), 58 Stat. 663, 41 U.S.C. 114(b)	2, 3
28 U.S.C. 1255	2

506384—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 835

HALTOM CITY STATE BANK OF FORT WORTH,
PETITIONER

v.

SEABOARD SURETY COMPANY AND THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the Court of Claims denying the petitioner's motion to dismiss (R. 67) is not yet reported.

JURISDICTION

The order of the Court of Claims was entered on January 14, 1959. The petition for a writ of certiorari was filed on April 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether this Court should review an interim order of the Court of Claims which denied motions by a

third-party defendant to dismiss the petition filed against the United States and the cross-claim filed by the United States against it.

STATUTE INVOLVED

28 U.S.C. 1255 provides in pertinent part:

> § 1255. *Court of Claims; certiorari; certified questions.*
>
> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant;
>
> * * * * *

Section 14(b) of the Contract Settlement Act of 1944, 58 Stat. 663, 41 U.S.C. 114(b), provides in pertinent part:

> (b) The Court of Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suits or proceedings, within such period of time prior to judgment as the Court of Claims shall prescribe. * * *

STATEMENT

Respondent Seaboard Surety Company is the surety on a performance and payment bond of a contractor who had contracted to construct a building for the United States (R. 2, 5). The contractor assigned to the petitioner, a bank, monies which were due or to become due to it under the contract (R. 2, 6, 8).

Pursuant to this assignment the United States paid to petitioner the sums earned by the contractor (R. 3, 6, 8). The surety then brought this action against the United States in the Court of Claims to recover amounts which it allegedly had paid in satisfaction of claims of laborers and materialmen arising out of the performance by the contractor. The complaint asserted that the assignment between petitioner and the contractor was ineffective as to the surety because of a failure to comply with the notice provisions of the Assignment of Claims Act of 1940, 54 Stat. 1029, as amended, 31 U.S.C. 203.

The United States denied liability to the surety, contesting the surety's claim that the assignment was ineffective as against it (R. 6). The United States also filed a cross-claim against the petitioner under the authority of Section 14(b) of the Contract Settlement Act of 1944, 58 Stat. 663, 41 U.S.C. 114(b) (R. 9). The cross-claim asserted that, if the court should decide that any of the money paid to the petitioner should have been paid to the surety, and if the court should enter a judgment in favor of the surety for such money, the United States would be entitled to a judgment in an equal amount against petitioner on the ground that the money had been paid to it under a mistake of fact and law (R. 13).

The petitioner moved to dismiss the surety's petition in the Court of Claims on the ground that, as it did not assert any claim to money then in the hands of the United States, it did not come within the jurisdiction of the Court of Claims (R. 25, 43–49). Petitioner also moved to dismiss the cross-claim, asserting

that the Court of Claims has neither statutory nor constitutional authority to entertain a cross-claim (R. 15, 49–64).

The Court of Claims denied petitioner's motions. It ruled (1) that the jurisdiction of the Court of Claims over the surety's petition against the United States could not be attacked by petitioner, and (2) that the Court of Claims has statutory authority to entertain a cross-claim in this suit and such authority is constitutional (R. 67–68).

ARGUMENT

The petition for certiorari should be denied. The order which petitioner seeks to have reviewed by this Court simply denied pre-trial motions to dismiss both the surety's petition against the United States and the cross-claim filed by the Government against petitioner. No final judgment has been entered. The case will presumably be set for trial on the merits before the commissioner in the near future.

With the case in this posture we are confident that the Court would not wish to review the interim order of the Court of Claims if it had jurisdiction to do so. No special reasons are advanced why this Court should take the case away from the Court of Claims at this juncture, assuming that power to do so existed. After the Court of Claims has taken final action in the matter, whatever questions the petitioner wishes this Court now to review may be academic and no longer justiciable. No legal rights of petitioner will

[1] The case has been referred by the Court of Claims to a commissioner before whom the matter is now pending on its merits.

be prejudiced by allowing the case in the Court of Claims to proceed to judgment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
SHERMAN L. COHN,
Attorneys.

MAY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959